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American Attitudes Towards the Proposed Membership in the Permanent Court of International Justice

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AMERICAN ATTITUDES TOWARDS THE PROPOSED MEMBERSHIP
3 IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE

by

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A Thesis Submitted to the Faculty of the Graduate School
of Loyola University in Partial Fulfillment of
the Requirements for the Degree of
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LIFE

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CHAPTER I

INTRODUCTION

Beginning with Jay's Treaty of 1795 in which such matters as the northeastern boundary, pre-Revolutionary War debts, and compensation for seizures were referred to arbitral commissions, the United States has ordinarily sought the settlement of controversies by peaceful means. With the turn of the twentieth century the United States considerably advanced this policy by attending the Hague Conference of 1899 at which the Permanent Court of Arbitration was established. Accepting the provisions of this Hague Convention the United States was the first nation to submit a case to the court, i.e., the Pious Fund Case. Actually this court was not a court in the true sense but rather a panel composed of more than one hundred jurists, four jurists being appointed by each nation signatory to the court. Generally, when a dispute arose between two nations that were members of the court which the parties conceded could be settled by arbitration, an arbitration board was appointed consisting of five jurists, each party choosing two jurists from their national panel and mutually agreeing upon a fifth. Realizing the inadequacies of the Hague Court, as it came to be called, a second

conference was held at The Hague in 1907 at which the United States was also represented. The American delegates to this conference were instructed by the then Secretary of State, Elihu Root,

to bring about in the second conference a development of The Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods, and under a sense of judicial responsibility.¹

A plan, based largely upon these suggestions, was drawn up but never put into effect because a satisfactory method of selecting judges on the court could not be agreed upon. Thus the situation remained until after the First World War.

With the birth of the League of Nations at the Peace Conference at Paris, the subject of an international court of justice was again brought into focus. Article XIV of the League Covenant provided that the Council of the League of Nations should "formulate and submit to the members of the League for adoption, plans for a Permanent Court of International Justice." In accordance with this provision the Council appointed a committee of jurists, which included Elihu Root, to frame a plan for the new court. Upon the recommendation of Root the committee

¹ America and the Permanent Court of Justice, in League of Nations, Vol. V, No. 5, published by the World Peace Foundation, Boston, 1922, 338.

followed the plan for a court drawn up at The Hague Conference of 1907. A constitution or Statute was formulated which defined the jurisdiction, organization and procedure of the court. On December 16, 1920, a special protocol or agreement was submitted to the members of the League of Nations for signature. In September, 1921, when the requisite number of nations had ratified, the court came into existence.²

When the nomination of candidates to the Court was proposed the American State Department declined to permit the American Hague panel to participate because of the bitter fight in the Senate concerning American entrance into the League of Nations. Nevertheless, despite America's non-participation, an American, John Bassett Moore, was elected to the Court. When in November, 1919, the Senate rejected the League treaty and the following year the Democrats were defeated at the polls, the new Republican administration adopted a policy of strict avoidance of the League and anything associated with it, which included the Court. This aloofness was maintained until February, 1923, when the pro-League Republicans persuaded President Harding to ask the Senate to vote American adherence to the Court.

The decade which followed this presidential request

² This court is technically referred to as the Permanent Court of International Justice but is also more commonly referred to as the World Court. In this thesis the investigator will refer to this court as the "World Court" or the "Court" for the sake of convenience.

is both an interesting and a puzzling one because the United States which had so consistently supported the idea of an international court of justice and which had played so important a part in its eventual creation, failed to join the Court after its establishment. In writing this thesis the answer to this problem will gradually evolve, but the primary objectives of this work are rather the following: (1) The presentation of American attitudes toward World Court adherence as reflected by the President and State Department, the Congress, and American periodicals and newspapers; (2) The presentation of the basic arguments underlying the various attitudes represented; (3) The determination, if possible, of the general American attitude toward adherence to the World Court; and, (4) The interpretation of these attitudes in relation to national policy, both past and present.

In developing this thesis considerable emphasis will be placed upon the Senate debates relating to the World Court. In fact, the history of the Court as recorded in the Congressional Record will generally be the organizing and unifying thread of this work. This must necessarily be the case for almost all other attitudes toward the Court are inextricably interwoven with the proceedings in the Senate. In presenting some of the arguments which favor or oppose adherence to the World Court the discussion will often be semi-legal or legal in character. There are two reasons why this is required: (1) It will serve to

emphasize and clarify points of view and policies; and, (2) It will give intelligibility to attitudes expressed outside the Senate.

CHAPTER II

HARDING AND THE WORLD COURT

In accordance with the suggestion made in February, 1923, by President Harding, his Secretary of State, Charles E. Hughes, prepared a letter strongly recommending American adherence to the World Court. In this letter Hughes declared that it had been the time-honored policy of the United States to promote the peaceful settlement of international controversies and it was his belief that joining the World Court was continuing this policy. He declared that though certain procedural provisions of the Court's constitution related to the League of Nations the independence of the Court was by no means impaired.¹ Nevertheless, Hughes felt that certain reservations should accompany American adherence in order to put at rest the fears of some persons and also to put the United States upon a plane of equality with the other nations that were members of the Court. He therefore proposed that the following reservations be made conditions of American adherence:

¹ America and the Permanent Court of Justice, in the League of Nations, Vol. V, No. 5, 348.

1. Adhesion should not be construed to involved any legal relationship between the United States and the League of Nations or that the United States was assuming any obligations under the Covenant of the League.

2. Permission be granted to the United States to participate in an equal manner in both the Assembly and the Council in any proceedings which involved the election of judges to the Court or the filling of vacancies.

3. Permission be granted the United States to pay a fair share of the expenses of the Court.

4. Amendment of the Statute of the Court could only be made with the consent of the United States.²

President Harding seems to have been in full accord with the Hughes' reservations for on February 24, 1923, he sent a message, accompanied by the Hughes' letter, to the Senate. In his message he stated that the United States had always played a conspicuous role in the advocating of the Court and he felt that "our deliberate public opinion today is overwhelmingly in favor of our participation..."³ He then urged the Senate to give its favorable advice and consent to the proposal for adherence.

The Senate upon reception of the Harding communication immediately referred the matter to the Senate Foreign Relations Committee⁴ and due to the fact that the current session of

2 Ibid., 350-351.

3 Ibid., 342.

4 For a detailed discussion of the World Court proposal while in committee see Eleanor Dennison's The Senate Foreign Relations Committee, Stanford, California, 1942.

Congress was almost near its end, consideration of the Harding proposal was postponed until December, 1923. However, although the Court proposal was not to be considered by the Congress until the end of the year, it was not long before opposition to adherence began to express itself in the form of a group of determined senators which included William E. Borah (R), James A. Reed of Missouri (D), Robert M. LaFollette (R), and Hiram W. Johnson (R). Senator Borah declared that he was in favor of an international tribunal but not a political tribunal that masqueraded as one.⁵ Senator Johnson expressed opposition to the Court because he felt that entering the Court was the first step toward entering the League of Nations and that from the League the next step was entanglement in Europe.⁶ On the other hand LaFollette of Wisconsin objected to the Court because he considered it as a clever plot of international bankers to draw the United States into the European chaos.⁷ Reed of Missouri felt that any talk of entering the Court was nothing short of treason.⁸

5 William E. Borah, "Starting the Fight to Join the Peace Court", Literary Digest, New York, LXXVI, March 10, 1923, 8.

6 Hiram W. Johnson, "Should the United States Join the Permanent Court of International Justice?--Pro and Con", Congressional Digest, Washington, II, May, 1923, 244 and 250.

7 Ibid., 243.

8 Ibid., 249.

The initial response of some representative newspapers⁹ was almost the reverse of that of the senators mentioned above. The Chicago Daily Tribune (Ind. Rep.) thought that the Hughes' suggestions were advisable in order that American adherence would not be interpreted as a legal relationship with the League.¹⁰ On the other side of the political fence the New York Times (Ind. Dem.) expressed its impatience over the fact that Harding had waited so long before requesting adherence but still was happy over the "big and gratifying" action.¹¹ The Chicago Daily News (Ind.) proclaimed its support of the Court because it felt that American jurists and publicists had long favored international courts of law and justice as did also American public opinion.¹²

During the summer of 1923 President Harding went on the Alaskan tour which ended in his death on the second of August. Up until this tour his addresses had urged American adherence to the Court according to the reservations which Secretary Hughes

9 The investigator will not attempt to make a comprehensive survey of newspaper attitudes because of time and source limitations. Instead three newspapers representing the Democratic, Republican and Independent attitudes have been selected (New York Times, Chicago Daily Tribune and Chicago Daily News, respectively), and it is hoped a fair index will thus be obtained.

10 Chicago Daily Tribune, editorial, "The Protocol", February 27, 1923.

11 New York Times, editorial, "A World Jurisdiction", February 26, 1923.

12 Chicago Daily News, editorial, "Promoting the Reign of Law", February 27, 1923.

had proposed the previous February. However, on June 21, 1923, Harding gave a speech in St. Louis, Missouri, which by its ambiguity left considerable doubt as to his attitude toward the Court. In this speech he again advocated American adherence to the World Court but he felt that the following two conditions were "indispensable": (1) That the Court must be beyond doubt "a world court and not a league court"; and, (2) That the United States must be on a plane of equality with other members of the Court.¹³ Admitting that there was a definite connection between the Court and the League he declared, however, that he would prefer that the two be completely independent. Later in his speech he declared that the Court should not be put aside because it did not conform in every detail with American expectations, but he then proceeded to say, "but I want the World Court proposal utterly dissociated from any intention of entrance into the League."¹⁴ Finally, near the end of his speech he referred to the excellence of the Court as it was then constituted but he felt that it should be made self-perpetuating. In order that this might be accomplished he suggested that the Court itself fill all vacancies instead of the Assembly and Council, and further, that the function of electing

¹³ James W. Murphy, compiler, Speeches and Addresses of Warren G. Harding, President of the United States, Washington, 1923, 38.

¹⁴ Ibid., 39.

judges be transferred to the remaining members of the Court.¹⁵

After mentioning other changes that might be accomplished he concluded by stating:

I neither advance nor retreat from the position which I assumed in my recent message to the Senate. My sole purpose tonight has been to amplify the constructive suggestions which...I placed before the country for consideration and judgment.¹⁶

Thus rested the Court issue at Harding's death.

15 Ibid., 41.

16 Ibid., 46.

CHAPTER III

COOLIDGE, THE COURT AND THE COMMITTEE

On December 6, 1923, in a message to a joint session of Congress, Calvin Coolidge announced that he advocated American adherence to the World Court. He declared that he favored some form of international court and since the World Court presented the only plan on which many nations had ever agreed he therefore recommended adherence.¹ However, the Senate Foreign Relations Committee, of which Henry Cabot Lodge (R) was chairman, did not act upon the Coolidge recommendation until April of 1924. At that time it was decided that a sub-committee under the chairmanship of George W. Pepper (R) should be appointed to give audience to persons desiring to express views on the World Court. This sub-committee held its hearings on April 30th and May 1st, during which the representatives of various national organizations representing religious, labor, legal and women's groups voiced their opinions. These groups advocated prompt adherence to the World Court

¹ Annual Message of the President of the United States to a Joint Session of the Senate and the House of Representatives, Washington, 1923, 2.

as had been proposed by Presidents Harding and Coolidge.

Shortly after these hearings, on May 6, 1924, Claude A. Swanson (D), proposed a resolution which was essentially identical with the Harding-Hughes proposal,² but two days later Senator Lodge offered a counter-resolution that was both unusual and significant. According to the proposal Senator Lodge requested that the President call a third Hague conference for the purpose of creating a new World Court at The Hague. The Lodge plan was similar to the Statute of the existent World Court in respect to jurisdiction and procedure but differed in regards to the election of judges and on questions open to advisory opinions. According to the plan the election of judges no longer would be made by the League of Nations but by a special electoral commission. The jurisdiction of the court in relation to advisory opinions was restricted so that no opinions could be rendered on any question involving the admission of aliens into the United States, the territorial integrity of the several States, alleged indebtedness or money obligations of any State or the United States, the Monroe Doctrine, purely governmental policies, and on any question that the United States considered domestic in nature.³ Thus the Lodge plan sought divorcement from the League of Nations and protection

² U.S. Congress, Senate, Senate Resolution No. 220, Congressional Record, 68th Cong., 1st Sess., Monday, May 6, 1924, Vol. 65, Pt. 8, Washington, 1924, 7904.

³ New York Times, May 9, 1924.

for the United States.

The Lodge resolution did not receive favorable consideration from President Coolidge and shortly thereafter on May 24, 1924, Senator Pepper proposed a compromise plan to the two already offered. The compromise resolution suggested that the Harding-Hughes reservations should be further supplemented. It proposed several amendments to the Statute of the World Court which included the following: (1) Vacancies on the Court should be filled at an election by the Court's signatories, and not by all the members of the League of Nations; (2) Judges of the Court should be elected by an electoral body composed of the signatories of the Court and modeled after the League Assembly and Council; (3) The British Empire was not to have more than one vote in either of the two branches of the electoral body; and, (4) All mention of the League of Nations, the Assembly, the Council or any functionaries of the League was to be stricken from the Court Statute. Besides conditioning American adherence upon these amendments to the Statute, the Pepper resolution announced that the United States disdained all responsibility for the exercise by the Court of its jurisdiction to render advisory opinions and recommended that the President contact the signatory states of the Court with the object of amending the Statute as to obtain a "disassociation

of the Court from the League of Nations."⁴

When the Swanson and Pepper resolutions were voted upon in committee the former was rejected by a vote of 10-8 and the latter accepted, 10-6. With the passage of the Pepper resolution both the majority and minority groups submitted reports. The majority report defended the Pepper resolution by maintaining that a direct legal relationship was created between the Court and the League by certain provisions in the Statute. Special objection was made to the election of judges by the League Assembly and Council and it was also asserted that the advisory opinion power of the Court constituted a "highly dangerous and undesirable jurisdiction."⁵ In the minority report, which took the opposite position, it was argued that the Swanson reservations (Harding-Hughes) effectively settled the question of a legal relationship between the Court and the League. It was asserted that since the Statute of the Court had been ratified separately by the various signatories as in the case of a treaty, the Court existed as a body separate and distinct from the League. Further, it was contended that by requiring the signatories of the Court to duplicate their representatives in the League Council and Assembly for the sole purpose of

4 United States Congress, Senate, Senate Documents, Senate Document No. 116, 68th Congress, 1st Sess., Miscellaneous Vol. II, 8254, Washington, 1924, 1-2.

5 Wharton G. Pepper, "The Pepper Plan--Pro and Con", Congressional Digest, III, June, 1924, 301.

electing judges was an "unconcealed enmity to the League of Nations."⁶

The Swanson and Pepper resolutions, not to ignore the Lodge plan, are significant in that basic issues concerning the problem of American adherence are beginning to take form. Here also may be noted the formation of two opposing groups which may be referred to as the "anti-Court" and "pro-Court" forces. These two terms are not strictly accurate but will suffice for now. The anti-League attitude which is manifested by the anti-Court group on the committee is explained by the fact that Senators Henry C. Lodge, William E. Borah, Hiram W. Johnson and Frank Brandegee were all members of the so-called "Battalion of Death." Their opposition to the Court quite obviously stemmed from their hostility to the League.

With the passage by the committee of the Pepper resolution action on the World Court issue ceased for the current session of Congress. However, following the adjournment of the Congress President Coolidge made two speeches that further clarified and also broadened his position on American adherence to the World Court. In his Memorial Day speech at Arlington Cemetery he asserted that he still stood for American adherence to the

⁶ United States Congress, Senate, Senate Reports, Report No. 634, Pt. 2, 68th Congress, 1st Sess., Vol. B, 8223, Washington, 1924, 5.

World Court as proposed by Harding and then added:

I should not oppose other reservations; but any material changes which would not probably receive the consent of the many other nations would be impracticable. We cannot take a step in advance of this kind without assuming certain obligations. Here again if we are to receive something we must surrender something. We may as well face the question candidly, and if we are willing to assume these new duties in exchange for the benefits which will accrue to us, let us say so. If we are not willing, let us say that.⁷

In his message to Congress on December 3, 1924, Coolidge buttressed his declaration that he was willing to accept "other reservations" by suggesting that adherence be further conditioned by a restriction on the advisory opinion power of the Court. He proposed that the United States should not be bound by any advisory opinion which was rendered upon a question which was not submitted voluntarily by America to the Court.⁸ Despite this recommendation the Senate committee took no action on adherence and the matter remained unchanged through March 3, 1925.

On that date, interest in the World Court issue was temporarily shifted from the Senate committee and the President to the House of Representatives. Realizing that it had no power whatsoever to advise the Senate when that body was considering a treaty but yet feeling that at least it was indirectly interested

⁷ Excerpt from Coolidge speech, "The World Court--Who Are Its Enemies?", Outlook, New York, Vol. 137, June 11, 1924, 219.

⁸ Message of the President of the United States to the Congress, December 3, 1924, Washington, 1924, 12-13.

since it might be required to appropriate monies to pay a share of the Court's expenses if the United States should adhere, the House passed a resolution in which it expressed the desire that the United States adhere to the World Court according to the Harding-Hughes reservations. In its resolution the House declared that it supported adherence because it had been the traditional policy of the United States to avoid war and to urge the settlement of international controversies either by arbitration or judicial process.⁹ The vote in favor of the resolution was clearly indicative of the House attitude; 303 yeas, 28 nays, and 100 not voting. From a study of the vote it can be safely said that party lines were not involved. Of the 208 Democrats and 222 Republicans in the House, the yeas consisted of 150 Democrats and 153 Republicans, while the nays were composed of 10 Democrats, 17 Republicans and 1 Farmer-Laborite.¹⁰

The day following the passage of the House resolution President Coolidge made his Inaugural Address to the Congress. In this address he devoted considerable time to the matter of the World Court. After mentioning that the Court issue had been pending before the Senate for almost three years and after restating his suggestion of a reservation relating to advisory opinions,

⁹ United States Congress, House of Representatives, Congressional Record, 68th Congress, 2nd Sess., Tuesday, March 3, 1925, Vol. 66, Pt. 5, Washington, 1925, 5405-5406.

¹⁰ Ibid., 5413.

he went into a detailed defense of the Court. He defended the advisory opinion power of the Court by saying that it neither interfered with the independence of the Court nor was harmful to it; in fact, it might prove very beneficial in some cases. He felt that if the United States joined the Court and a decision were rendered on a matter against the will of the United States, America would have both a moral and a legal right to disregard the verdict if she chose to do so. In concluding he stated that in joining the Court the United States was not accepting a disproportionate share of the "world's burden" which it could not escape bearing even if it wished. Rather he felt that "we shall do far better service to ourselves and to others if we admit this and discharge our duties voluntarily, than if we deny it and are forced to meet the same obligations unwillingly."¹¹

On the next day, in a special session of the Senate, a reconsideration of the World Court proposal was begun. The Swanson resolution was re-introduced and on March 13, 1925, by a vote of 77-2, the Senate agreed that on December 17, 1925, it would consider that proposal in open executive session. Thus the World Court issue was removed from committee consideration and was presented for open Senate debate--debate that proved both lengthy and bitter.

¹¹ Message of the President of the United States Communicated to the Two Houses of the Congress, Washington, 1925, 9.

CHAPTER IV

COURT OR NO COURT

Having considered the World Court in relation to the Senate and President as of March, 1925, mention will now be made of attitudes from other sources. Beginning with the first of December, 1924, to the end of February, 1925, hundreds (perhaps thousands) of resolutions were sent to local newspapers, state and federal congressmen, members of the Senate Foreign Relations Committee, and even President Coolidge himself, urging that the United States join the Court.¹ As indicated by the Congressional Record these resolutions not only came from mayors and municipal bodies, but in some cases even from state legislatures such as those of Delaware, Ohio, Vermont and Colorado. Numerous letters, memorials, telegrams, etc., can also be found in the same source. These communications besides expressing the opinion of individuals represented the group thought of religious, business, legal, military, labor, peace and women's organizations, both local and

¹ Marguerite L. Bentley, "Do Americans Want the World Court", American Review of Reviews, New York, LXXI, January-June, 1925, 629.

national.² In advocating adherence according to the Harding-Hughes reservations the bulk of the correspondence stressed the point that by joining the Court the use of force would be substituted by the use of law. It is probably impossible to determine precisely how much correspondence was actually sent but several senators in the Record make mention of the large amount of correspondence they received relating to the Court. Of the many correspondents recorded in the Record only a very few expressed opposition to the Court and among the opponents were the Ku Klux Klan and the Ancient Order of Hibernians.

In studying the articles on the World Court found in periodicals during 1924 to 1925 it appears that most writers favored American adherence to the Court, but their reasons for adherence or non-adherence, if such were the case, varied considerably. An officer of the National League of Women Voters felt that the basic issue involved in adherence was that international disputes could either be settled by fighting or by arbitrating; she chose the latter even if it meant sacrificing a little American sovereignty.³

Considering the Court from a lawyer's point of view, disagreement is found as might be expected. Professor Manley O.

2 Cf., Appendix I.

3 Ruth Morgan, "Arbitration as a War Substitute", Annals of American Academy of Political and Social Science, Philadelphia, Vol. 114, July, 1924, 126-127.

Hudson of the Harvard Law School favored United States adherence to the Court because he felt that it was not merely a private League Court as some contended but rather a true international court, for any state might appear before it as a party. He disagreed with those who felt that force, if necessary, should be used to enforce decisions of the Court. Rather, he felt that the moral strength of the Court and world opinion must be the principal sanctions of the Court's decisions.⁴

Professor Edwin M. Borchard of the Yale Law School took the opposite side of the issue. He strongly objected to American adherence because the Court had a very limited jurisdiction and felt that this indicated that nations were really unwilling to substitute amicable methods of settling disputes for belligerent ways.⁵ Compulsory jurisdiction, he asserted, had been accepted only by a few small nations but none of the large. He considered economic and political factors and forces far more common and important causes of wars than disputes over legal technicalities, and if the Court failed to have jurisdiction over purely justiciable or legal questions, as was now the case, he doubted that the Court would have any real effect upon promoting world peace. Assuming therefore that the Court had little

⁴ Manley O. Hudson, "Shall America Support the World Court?", Atlantic Monthly, Boston and New York, CXXXI, January, 1923, 134.

⁵ Cf., Appendix II.

relation to the problem of peace, he reasoned American adherence or non-adherence would have little effect on promoting or retarding peace. He then suggested that perhaps advocates of the World Court had other reasons for urging American adherence, namely, it would subsequently mean American entrance into the League of Nations.⁶

Also opposed to the Court but for an entirely different reason was the writer of a series of articles found in the Nation. The author cited the American Supreme Court's policy of not using force to enforce its decisions; a policy which he feared the World Court could not follow because the League of Nations would use its economic and military sanctions.⁷ He then concluded that in order to avoid any unfavorable decree of the Court's being enforced against the United States, the Hughes reservations should further be expanded so as to prevent the enforcement of the Court's decrees by use of war. Thus strange as it seems, the writer, who was opposed to the Court, held exactly the same attitude on the subject of enforcement as did Professor Hudson who favored adherence.

Turning again finally to the woman's point of view on

6 Edwin M. Borchard, "The Permanent Court of International Justice", North American Review, CCXVIII, July, 1923, 8-16.

7 James N. Rosenberg, "Power to Decide, Not to Enforce", Nation, New York, Vol. 121, December 9, 1925, 650; and, "Reservations", December, 16, 1925, 699.

the Court, an article in the Ladies' Home Journal, appealed to American women that since war was now international in its scope, the machinery necessary to obviate it must therefore also be international in its breadth. The author believed that times had changed since Washington and that in the twentieth century Americans were now "allied by blood to every nation of the world; whose commercial interests are intertwined with every shore, and in an age whose governmental theories in all lands have been rapidly approximating our own."⁸

The articles mentioned here include only a few of the arguments offered for and against the World Court. Other arguments in favor of the Court were: (1) The United States was obligated to the world to support the Court; (2) The Court was the only international organization that agreed with American ideals and traditions; and, (3) The Democratic and Republican platforms favored American adherence. Other arguments which urged against American adherence were: (1) The Court handled only insignificant cases; (2) The Court might consider questions involving vital interests, independence and national honor; and, (3) The Court only duplicated the functions of the Permanent Court of Arbitration at The Hague.

⁸ Alice A. Winters, "Women and the World Court", Ladies' Home Journal, Philadelphia, XL, December, 1923, 165.

CHAPTER V

DEBATE AND DECISION

Prenote: In discussing the debate in the Senate which began on December 17, 1925, the subject will be considered from two aspects: (1) The general attitudes on American adherence as expressed in the debate; and, (2) The major points of contention in the debate and its final resolution.

PART I

Attitudes toward American adherence to the World Court for purposes of clarity and convenience can be divided into two basic classes: (1) Attitudes which opposed adherence to the Court; and, (2) Attitudes which favored adherence, whether qualified or unqualified. Those senators composing the first class may be referred to as the anti-Court group, while those falling into the second class, the pro-Court group. Though there may be a slight overlapping this division is essentially sound. First, considering the anti-Court group, it will be found that it consisted mostly of Republicans with the exception of two Democrats. The Republicans in this group included Senators William E. Borah, George H. Moses, Arthur Robinson (Ind.), Smith W. Brookhart, Bert M. Fernald, John W. Harreld, Gerald P. Nye, George H. Williams, Robert M. LaPollette, Jr., Hiram W. Johnson, and a few others,

while the Democrats were Senators James A. Reed (Missouri) and Cole L. Blease.

The objections to adherence voiced by these senators were not all the same but rather of various general types. The most common objection encountered was that the Court was intimately related to the League of Nations. Senator Borah, leader of the anti-Court group, illustrates this objection when he declared

if we become members of the Court, we are obligated thereby to do all in our power to preserve it. If we join in good faith and continue to believe in the Court, it will be our obvious duty to preserve that institution without which the Court cannot exist--the League of Nations.¹

Borah's concept of an international court of justice was a tribunal that was built upon an efficient plan, that possessed independent judicial power, and that was divorced from the control of international politics. Because of the World Court's relation to the League he reasoned that it by no means met these qualifications.

Many senators were of the opinion that if the United States joined the World Court the next unavoidable step would be entrance into the League of Nations. Senator Moses asserted that unless certain reservations were incorporated into the American protocol of adherence which would divorce the Court from the League he would not vote

¹ William E. Borah, "How the World Court Can Be Perfected", Ladies' Home Journal, XL, October, 1923, 9.

under any circumstances, for any measure which in any degree makes or tends to make the United States in any sense a party to the odious bargains which stuff the treaty of Versailles--an instrument which we have twice rejected in this Chamber...; an instrument which this court of the League of Nations spends most of its time trying to interpret.²

A third objection which was consistently mentioned was that by adhering to the Court and involving itself with the League of Nations, the United States was violating its century old policy of avoiding entangling foreign alliances. The speeches of Washington, Jefferson, Clay, Lincoln and other prominent American statesmen who had advocated aloofness from the intrigues and imperialism of European diplomacy were frequently cited. Stating this objection very well was Senator Robinson (Ind.) who declared that

understanding as I do and believing as I do that the Constitution of the World Court is the covenant of the League of Nations and knowing as I do that treaties represent the supreme law of the Land, it seems it would be utterly foolhardy for the American people to depart from their traditional custom of not interfering with other nations in the slightest degree and of not becoming embroiled in their affairs or making any entangling alliance of any kind.³

The final major objection presented by senators of the anti-Court group and which was given special emphasis by Senators Blease, Reed, Fernald, and Henrik Shipstead (Farmer-Laborite),

² United States Congress, Senate, Congressional Record, 69th Congress, 1st Sess., Saturday, January 16, 1926, Vol. 67, Pt. 2, Washington, 1926, 2194.

³ Ibid., Tuesday, January 26, 1926, Pt. 3, 2754.

was that American adherence would involve loss of sovereignty. Senator Fernald described the Court issue as the same as that when the League of Nations' question was before the Senate. To him the battle was one between nationalism and internationalism, "between national independence under the Constitution and a partial and perilous surrender of our national sovereignty."⁴ Arguing much along the same line was Senator Reed (Missouri) who strongly objected to any proposition which would require the United States to submit controversies with foreign nations to a court created by foreign nations, composed of delegates of foreign nations, and in which the United States had no assurance of either membership or voice. To the senator this was internationalism, a "miserable kind of internationalism."⁵

The afore-mentioned objections give a fair representation of the attitudes of the anti-Court senators. This group also often objected to "Wall Street", "Morgan & Co." and the "international bankers and financiers" but this was done infrequently and is of no great consequence.

Shifting now to the contraposition, that is, to attitudes favoring American adherence to the World Court, it is best perhaps to mention "degrees" of adherence before specific

4 Ibid., Friday, January 15, 1926, Pt. 2, 2105.

5 Ibid., Tuesday, January 19, 1926, Pt. 3, 2363.

attitudes are discussed. Previously, the investigator when referring to the "pro-Court" group simply described it as a group of senators which favored adherence; this now needs further clarification. Actually, within the pro-Court group there existed at least two sub-groups, one which advocated unqualified or unconditional adherence to the World Court and the other which advocated adherence to the Court but only if adherence were qualified or conditioned by certain Senate "reservations." The latter group, sometimes referred to as the "reservationists", felt that since there existed some type of relationship, legal or otherwise, between the World Court and the League of Nations the United States should protect itself from any involvement with the League by inserting certain formal conditions or reservations in the protocol of adherence to the Court. Generally, if perhaps not exclusively, this group was composed of Republican senators such as Simeon D. Fess and George W. Pepper. On the other hand the group of senators favoring unconditional adherence seems to have been composed mostly of Democrats.

In discussing the attitudes which favored American adherence to the Court it will again be found convenient to make use of a non-categorical classification. The pro-Court attitudes may be classified as follows:

1. Cost of War: Senator Heflin (D) argued that the World War had cost the world some ten million in dead and the United

States in particular three hundred thousand dead and forty billion dollars. By joining the Court he felt that this might be avoided in the future.⁶

2. Promotion of Peace: Irvine L. Lenroot (R) believed that although the United States would receive no benefits from joining the Court, nevertheless, it should join "because we will thereby give the endorsement and encouragement of the most powerful nation in the world to an instrument of peace."⁷

3. An American policy: Seeing no danger in America's becoming involved in European affairs or the European system Senator Tyson (D) felt that adherence to the Court was only a continuance of the traditional American policy of settling controversies by pacific means.⁸

4. Matter of Duty: According to Senator Fess (R) a nation might ignore its national interests but it could never "ignore its national honor or its national duties."⁹

5. Impossibility of National Isolation: Feeling that improved means of communication and transportation had so interwoven trade and commerce, Senator Swanson (D) declared that "however much

6 Ibid., Tuesday, January 26, 1926, Pt. 3, 2744.

7 Ibid., Friday, December 18, 1925, Pt. 1, 1070.

8 Ibid., Saturday, January 23, 1926, Pt. 3, 2640.

9 Ibid., Wednesday, January 6, 1926, Pt. 2, 1578.

any of us may desire national isolation the time is past when this can exist, and if possessed it cannot continue. Our development has been such that all which affects the world must inevitably affect us."¹⁰

6. Entrance Into League: Senator Bruce (D) expressed the view that entrance into the Court would subsequently be followed by entrance into the League of Nations.¹¹ This statement by the senator only served to confirm the belief of many anti-Court senators such as Borah and Reed that the Democrats were interested in American adherence to the Court solely because it would mean League entrance. Since Senator Bruce was the only Democrat whom the investigator can recall who expressed such an attitude it is difficult to determine how much truth there was in the anti-Court group contention. However, it should be remembered that if other Democratic senators shared Bruce's attitude it would have been extremely prudent upon their part to have remained silent on the subject for an open expression of their views probably would have served only to force some Republican "reservationist" senators into the anti-Court fold.

10 Ibid., Thursday, January 17, 1926, Pt. 1, 975.

11 Ibid., Tuesday, January 5, 1926, Pt. 2, 1481.

PART II

On December 17, 1925, the first day of the lengthy Senate World Court debate, Senator Swanson (D), leader of the pro-Court group, introduced into the Senate open executive session a resolution (Resolution No. 5) which included the four Harding-Hughes reservations and also a fifth which related to the advisory opinion power of the Court. Article 5 of the resolution which pertained to the advisory opinion power read:

That the United States shall be in no manner bound by any advisory opinion of the Permanent Court of International Justice not pursuant to a request in which it, the United States shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory.¹

After presenting his new resolution Senator Swanson, in a fourteen page speech discussed some of the arguments presented against the World Court. He first considered the objection that since the Court's judges were elected by the League Assembly and the Council and that since they had their salaries fixed by the same bodies; it might well be possible that the independence of the judges would be threatened. He answered by asserting that the fact that the President of the United States nominated judges to the Supreme Court and that the Congress determined the salaries

¹ Congressional Record, 69th Congress, 1st Sess., Thursday, December 17, 1925, Vol. 67, Pt. 1, 974.

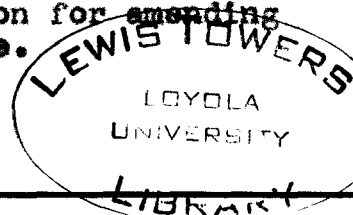
of the judges, did not lessen the integrity of that tribunal.² Turning to the objection concerning the advisory opinion power of the Court he declared that although the League of Nations had the right to request advisory opinions of the Court as in accordance with Article XIV of the Treaty of Versailles, the Court alone had the right to determine whether or not it would consider the question the League submitted to it.³ Any danger he felt that the Court itself might misuse or abuse the advisory opinion power was precluded by the Rules of the Court⁴ which clearly and rigidly defined the procedure to be used in rendering any opinion. These rules of the Court provided that: (1) The request must be in writing and the question exactly stated; (2) The members of the Court must be notified of the request; (3) A public hearing must be given both parties; and, (4) The opinion must be rendered in open Court.⁵ In justifying the advisory opinion power per se Swanson argued that it found common use not only in Canadian

2 Cf., Appendix II for text of the articles of the Court's Statute which are relative to the discussion.

3 Cf., Appendix III, Article 14.

4 The original Statute of the Court consisted of 64 articles but later there were added several other articles which were referred to as the Rules of the Court. These rules were agreed to by a majority vote of the signatories and could be repealed or amended by a similar vote; no provision for amending the original 64 articles was made in the Statute.

5 Cf., Appendix IV.



courts and the House of Lords but also even in some American state courts. After contending that the advisory opinion power could only affect the United States if it consented to be a party to the request, he concluded his speech by discussing the eighteen advisory opinions thus far rendered by the Court in order to demonstrate that they had been considered in an honest and capable manner.⁶

The following day Senator Borah, capable leader of the anti-Court group, presented a partial rebuttal to the Swanson discourse. He contended that nowhere in the Statute of the Court could there be found a provision bestowing upon the Court the power of rendering advisory opinions; rather, he felt that the advisory opinion power of the Court had its sole origin in Article XIV of the League Covenant. He further asserted that the League of Nations alone could request advisory opinions of the Court, that in reality the Court could not refuse to render an opinion if the League requested it, that the League might ask advisory opinions upon any question it chose, and finally, that an advisory opinion could be rendered by a mere majority vote of the Court. Stating his position on the advisory opinion power Borah declared:

⁶ United States Senate, Congressional Record, 69th Congress, 1st Sess., Thursday, December 17, 1925, Vol. 67, Pt. 1, 974-981.

When we take into consideration the numerous political questions, and the complex nature of them, concerning which this court may be called upon to advise, and of which we will be a member, how is it possible for us to keep that other pledge--, that is, to stay out of the politics of Europe?

Alluding to Article 35 of the Statute, Borah expressed doubt whether the Court was really international in character. He explained that only members of the League of Nations might use the Court, while other nations might avail themselves of the tribunal only when they complied with terms determined by the League Council which reserved to itself the right to amend or rescind those terms as it saw fit. He felt that a court which could be used only upon the permission of the League of Nations, was not in the true sense a "world" court. In concluding Borah expressed the opinion that American adherence to the Court should be further qualified or conditioned in two ways: (1) No force or economic sanctions should be used to enforce decrees or opinions of the Court; and, (2) Adherence to the Court should in no way imply departure by the United States from its policy of non-entanglement or from its traditional attitude towards purely American questions.⁸

7 Ibid., Friday, December 18, 1925, Pt. 1, 1074.

8 Ibid., 1073-1077.

Answering Borah, Senator Walsh (D) endeavored an interpretation of Article 36 which referred to the jurisdiction of the Court. He posed the question of what would happen if two parties, one of which was the United States, should bring before the Court a dispute involving the Monrone Doctrine. In answering he declared that such a situation might now exist without the United States being a member of the Court and even if America did enter the Court the same situation might occur. Would the United States be bound to enforce such a judgment? He believed it would not, for he felt that America was then free to protest and to take any other action which it considered justifiable. He then argued that by joining the Court the United States essentially did not put itself in any different position than it was now in as a member of the Permanent Court of Arbitration (The Hague Court).⁹

On December 21, 1925, Senator Pepper (R) injected into the Senate debate a proposal that the fifth reservation of the Swanson resolution be further modified. This proposal is not only significant because it brings to light several important objections to Court adherence but also because of its effect upon the final protocol of adherence. Pepper believed that there were three objections to American adherence that were worthy of consideration and that therefore reservations were proper to

⁹ Ibid., 1096.

meet them. First, he felt that although the rules of the Court provided for public procedure in the rendering of advisory opinions, these rules could easily be modified by a majority vote of the Court. This contingency could be removed by having the Court declare public procedure a permanent policy of the Court. Second, the Court had decided in the East Karelia case¹⁰ that it would not render an advisory opinion on a question if one of the parties did not give its consent, but since this decision was delivered by a majority vote (6-4) of the Court it might easily be reversed. The reversal of the policy expressed in this decision could be avoided by the Court declaring it a permanent policy. The third and last objection was that although the United States would not be bound by an advisory opinion which was rendered without its consent, it was not in any way able to determine what matters would be submitted by the League Council to the Court for an opinion. Pepper suggested that this inequality could be corrected by having the signatories of the Court agree that no advisory opinion would be given on a matter directly affecting the United States unless it first gave its consent.¹¹

10 The East Karelia case involved the status of the said region over which Finland, a member of the Court, and Russia, a non-member, were in dispute. When the Council asked the Court for an advisory opinion on the matter, the Court refused to render an opinion because Russia had not consented to submission of the controversy to peaceful settlement.

11 Senate, Congressional Record, Monday, December 21, 1925, Vol. 67, Pt. 2, 1245-1246.

In suggesting the latter two reservations Pepper may have had in mind the objections of Borah and Moses concerning advisory opinions. Borah's position was that the Court was a professional advisor to the League and was obligated to respond when the Council requested advice on a matter. Borah's declaration on the matter was:

The position of the council and the court, therefore, is that the covenant places this body at the disposition of the council as a consulting body, as an advisory body, and the protest of an interested nation not a member of the league, does not in any way oust the court or council of jurisdiction to deal with the matter.¹²

Pepper disagreed with this concept feeling that the Court was rather a friendly advisor with perfect freedom to refuse its advice, but yet he felt that if the majority opinion in the East Karelia case were changed Borah's contention might become a reality.

The last reservation proposed by Pepper had its basis in the Harding argument that the United States upon adhering to the Court must be placed strictly on a plane of equality with other members of the Court. This did not appear to be the case as long as the major powers on the Council such as Great Britain, Italy, France, and Japan were able to block the submission of an advisory opinion to the Court and also to have a voice in the framing of any proposal for an advisory opinion submitted to the

¹² Ibid., Monday, January 18, 1926, Pt. 2, 2287. Actually, Borah's objection to the advisory opinion power was "fundamental"; he considered it "fundamentally wrong." Ibid., 2291.

Court. Obviously since the United States did not sit on the League Council, and probably would not accept a seat even if it were offered, it could not block the submission of an advisory opinion or participate in its framing. This situation, however, could be remedied by Pepper's third proposal. The last proposal also served to meet the objections of such senators as Moses¹³ who feared that the Council of the League might submit questions to the Court involving the competence of debtors to pay money to the United States, the subject of immigration and tariffs, and even the matter of Panama Canal tolls.¹⁴

In the last week of the Senate debates the discussion shifted to the jurisdiction of the Court and the enforcement of the Court's decrees. On January 21, Senator Reed contended that since the Court must advise the League on any matter it submitted, the extent of the jurisdiction of the Court was directly related to the powers of the League. He then cited Articles 3 and 4 of the League Covenant which declared that the Assembly and Council of the League might deal with "any matter within the sphere of the League affecting the peace of the world." With the League therefore possessing practically unrestricted power, the Court

13 Ibid., Saturday, January 16, 1926, Pt. 2, 2191.

14 The reader will recall American difficulties with Japan concerning immigration and also with Great Britain over the charging of canal tolls which were of importance during this period.

also possessed almost unrestricted jurisdiction. Interpreting Articles 11, 16 and 17 of the Treaty of Versailles,¹⁵ he declared that the League was vested with the power to wage war against any nation, including the United States.¹⁶ He concluded therefore that the League of Nations then instead of preventing wars would cause them by its almost limitless powers.

Senator Borah expressed a similar fear when he declared that he was "utterly opposed to enforcing the judgment of a court against a nation or a state by force, whether it is the Hague tribunal or this so-called court."¹⁷ He felt that the use of force in any peace plan would either result in the establishment of a world-wide arbitrary power with the consequent suppression of all freedom and independence, or the outbreak of war and the break down of that organization.¹⁸

A rebuttal to Reed's argument concerning the Court's jurisdiction was given by Senator Walsh who argued that there were no provisions of the Covenant that were applicable to the enforcement of decrees of the Court which were not also equally applicable to the enforcement of the decrees of the existing

15 Cf., Appendix III.

16 Senate, Congressional Record, Thursday, January 21, 1926, Vol. 67, Pt. 3, 2489-2495.

17 Ibid., Wednesday, January 20, 1926, Pt. 3, 2435.

18 Ibid., Friday, January 22, 1926, 2555.

Court of Arbitration at The Hague. Further, he contended that there were no provisions which were not equally applicable to the enforcement of a judgment or decision rendered by a board of arbitration to which two nations might subscribe.¹⁹

On the last day of the Senate debate the argument over the enforcement of Court decisions reached its conclusion. Senator Moses introduced a resolution suggesting that a sixth reservation be incorporated into the protocol of adherence which would forbid the use of war to enforce a decision of the Court. The proposal was rejected.

As the Senate discussion moved into its final week Senator Swanson introduced a modification to the resolution he originally proposed on December 17th.²⁰ This new proposal was the result of conferences between both Republican and Democratic supporters of the original resolution. Proposals were made to modify this new resolution but despite these new suggestions the modified Swanson resolution remained unchanged and became the final protocol of adhesion. It is, however, interesting to note some of the other proposals made. Senator Blease (D) put forward the suggestion that each state of the United States have one vote

19 Ibid., Wednesday, January 27, 1926, 2812.

20 Ibid., Saturday, January 23, 1926, 2857.

in the Assembly of the League as had each member of the British Empire.²¹ Senators Borah and Reed submitted resolutions with essentially the same object but differed in that they suggested the British Empire collectively should have just one vote in the Assembly. The declared object of these proposals was to place the United States on a plane of equality in the Assembly when judges to the Court were elected. Senator Reed on the next to the last day of the debate submitted a proposal suggesting that the Statute of the Court be amended whereby the Monroe Doctrine would be declared a principle of international law. This proposition failed to be accepted because it was argued that the Monroe Doctrine was wholly a matter of American policy which only the United States should interpret; if it were made a matter of international law the Court instead would be delegated the power of interpretation.²²

With the cloture rule being invoked for the first time in fifty years in the Senate, the modified Swanson resolution was presented to the Senate for a vote on January 27th. The Senate accepted the resolution by a vote of 76 to 17, 3 senators not voting.²³ An analysis of the vote finds the yeas composed of

21 Ibid.,

22 Ibid., Tuesday, January 26, 1926, 2760-2762.

23 Ibid., Wednesday, January 27, 1926, 2813.

36 Democrats and 40 Republicans; the nays, 2 Democrats, 14 Republicans and 1 Farmer-Laborite; and, those not voting, 1 Democrat and 2 Republicans. It is of importance to note that of the five Republicans who voted against American entrance into the League of Nations on March 19, 1920, and who were still members of the Senate, four senators, Borah, Johnson, Moses and Fernald, voted in the negative on the Court issue. Only one of the fourteen Republican senators who voted for the League was opposed to entrance into the Court, namely, Senator Watson. On the other side of the political fence, of the twelve Democrats who voted against the League and who still remained in the Senate (Swanson included) only one, Senator Reed of Missouri, voted against the Court. The seven Democrats who voted for League entrance also voted for Court entrance.

The modified Swanson resolution which thus became the American protocol of adhesion to the World Court differed from the resolution proposed by Senator Swanson on December 17th in two ways: (1) The original fifth reservation was completely changed; and, (2) Two sub-resolutions were added.²⁴ Actually, the new fifth reservation was composed of two parts.

Part I of the new fifth reservation declared that

²⁴ Cf., Appendix V for the complete text of the Senate resolution of adhesion.

advisory opinions were to be rendered publicly and that all states interested in the question being considered were to have a public hearing. Thus the rules of the Court relating to advisory opinion procedure were made permanent.

Part II of reservation No. 5 declared that the Court would not entertain a request for an advisory opinion relating to a dispute or question in which the United States had or claimed it had an interest unless the United States gave its consent. This in effect was a statement of the principle declared in the East Karelia case and also put the United States on a plane of equality with other members of the Court in respect to requests for advisory opinions. Thus reservation No. 5 incorporated those suggestions made by Senator Pepper on December 21st.

Sub-resolution No. 1 provided that before a dispute between the United States and another nation could be considered by the Court, the Senate must first give its consent by means of a treaty. This resolution was evidently designed to safeguard the treaty-making power of the Senate. The same provision is also found in the twenty-two Root treaties which provided for the bringing of questions before the Permanent Court of Arbitration.

Sub-resolution No. 2 provided that adherence to the Court did not involve a relinquishment of America's policy of non-entanglement or its attitude toward "purely American questions", i.e., the Monroe Doctrine. This last resolution also

saw previous use for it was attached to both the Hague Convention of 1899 and the Hague Convention of 1907 to which the United States subscribed.²⁵

One last point that bears mentioning before closing this aspect of the discussion is that relating to the compulsory jurisdiction clause (Article 36) of the Statute. Though this optional clause provided for jurisdiction only on what may be referred to as justiciable matters the Senate, with the possible exception of Senator Borah, was opposed to acceptance. Even Borah, however, would not accept compulsory jurisdiction on matters arising under international law unless a truly international court of justice were established.²⁶ This avoidance by the Senate of compulsory jurisdiction was clearly reflected in the protocol of adhesion itself for specific mention was made that the United States refused to subscribe to the optional clause.

²⁵ American Society of International Law, American Journal of International Law: Supplement, Vol. 21, New Hampshire, 1927, 84 and 87.

²⁶ Senate, Congressional Record, Wednesday, January 27, 1926, Vol. 67, Pt. 3, 2813.

CHAPTER VI

NEITHER JOY NOR SADNESS

Press reaction to the Senate resolution of adherence seems to have been generally favorable. According to the Literary Digest the majority of the nation's newspapers welcomed adherence but it also commented that the Senate reservations tempered both the joy of the victors and the sadness of the vanquished. It further noted that many of the papers, both for and against adherence, believed that Court entrance would soon mean League entrance.¹

Of interest is a newspaper poll conducted by the American Foundation² for the New York Times during the first month of the Senate debate with the object of determining press attitude toward adherence to the World Court. According to the poll of some 1,042 newspapers questioned, 865 (83%) favored adherence, 114 (11%) were opposed, and 62 (6%) took no stand. Among those papers found in the opposition were the Hearst papers (22), the

1 Editorial, "Where Will the World Court Lead Us?", Literary Digest, New York, LXXXVIII, February 6, 1926, 5-6.

2 The American Foundation was strongly pro-Court in its sympathies and was often attacked by Senators Borah and Reed for they considered it a major source of pro-Court propaganda.

Chicago Daily Tribune, the New York Sun, the Kansas City Star, and the Washington Post. The two most common reasons given for opposition to American adherence to the Court were that the Court was a back door to the League with its resultant entangling alliances, and that adherence was a makeshift proposition to cover up American failure to join the League of Nations--indeed a remarkable case of strange bed fellows!³

The Chicago Daily Tribune which a month before had attacked the Court because it believed that a fixed international tribunal was incapable of being judicial, thanked those senators who had consistently opposed the World Court and then observed

We do not believe that any reservations can protect from all the possible consequences of this attachment, but they serve to strengthen the position hereafter of nationalists in the senate and to make it difficult for internationalists to surrender American interest to intrigue or false altruism.⁴

On the other hand the New York Times which had for three years impatiently advocated adherence, devoted three columns of its front page to details of the World Court triumph.⁵ The independent Chicago Daily News impassionately declared that the Senate vote reflected the mature judgment of the "thoughtful and

3 Editorial, "Poll Shows Press Favors Joining Court", New York Times, December 13, 1925, Pt. XX.

4 Editorial, "Our Debt to the World Court Opponents", Chicago Daily Tribune, January 28, 1926.

5 New York Times, January 28, 1926.

progressive element in the country."⁶ It, however, stated that American adherence was not significant from a practical but rather from a moral point of view.

An examination of relevant literature in current periodicals finds the response to the Senate's conditional acceptance of the World Court characterized by its variety but not particularly by its vigor. The Nation, which shared Borah's fear that the Court's decisions might be enforced by force, congratulated the Senate for restricting the advisory opinion power of the Court. It felt that Reservation No. 5 would weaken the Council's control over the Court and thus prevent the abuse of the advisory opinion power so as to obtain control over nations unwilling to litigate or to consent to an advisory opinion. Further, it felt that Reservation No. 5 would bar the Court's jurisdiction over any questions affecting the Western Hemisphere.⁷ David J. Hill, writing in the Saturday Evening Post, indulged perhaps in a little subtle sarcasm in discussing the issue. He commented that the Senate resolution reflected the Senate's distrust of the League, its intentions to have as little to do with the Court as possible, and that the little it had to do with the Court would be supervised. He then pointedly concluded by stating that the wisdom of the

⁶ Editorial, "Entering the Court", Chicago Daily News, January 29, 1926.

⁷ Editorial, "Those Advisory Opinions", Nation, Vol. 122, March 3, 1926, 220.

Senate should not be decried but that "it has committed the country to nothing of importance."⁸

An editorial in the Outlook saw the Senate reservations as neither harmless nor beneficial. However, it objected to the resolution (sub-resolution No. 1) that provided that the United States could appear only before the Court with the advice and consent of the Senate because it considered such a provision an unwarranted restriction upon the executive power. It then commented that it was quite certain that American adherence to the Court would not usher in a golden era of peace, but at least the United States would be morally committed to the theory that sovereign states had legal obligations which they were bound to respect and that the "true way to determine what those legal obligations are is by trial and decision of cases before impartial judges of law."⁹

Refraining from venturing an opinion upon the Senate resolution of adherence until the signatories of the Court had indicated their ratification of the Senate reservations was James G. MacDonald. He felt that whether or not they would accept the Senate reservations was dependent upon what procedure the United States adopted in making known its decisions upon advisory

⁸ David J. Hill, "Gentle Art of Learning to Swim Without Going Near the Water", Saturday Evening Post, Vol. 198, 210.

⁹ Editorial, "International Justice--With a String Attached to It?", Outlook, New York, February 10, 1926, 201-202.

opinions being considered by the League Council. He believed that if the United States would place a representative in the Council when a proposal for an advisory opinion was being considered, the signatories would have no objection to the conditional American adherence, but if the United States attempted to exercise its power after the Council had made its request, America would be refused entrance.¹⁰ Fortunately, or unfortunately, Mr. MacDonald's analysis of the resolution was not far from the truth.

¹⁰ James G. MacDonald, "American Obstacles to Arbitration and Conciliation", Annals of American Academy of Political and Social Science, CXXVI, July, 1926, 58.

CHAPTER VII

COOLIDGE AND THE DEADLOCK

After the Senate had approved the resolution of adherence, Secretary of State Frank B. Kellogg sent a copy of the resolution to each of the forty-eight signatory nations of the Court. The United States expected that the signatory nations would indicate their acceptance of the Senate reservations by an exchange of notes as provided for in the Senate resolution but these expectations soon received a sharp blow. The League Council, feeling that an exchange of notes was not sufficient for ratification of the resolution and also that the construction of the fifth reservation was uncertain, called a conference to be held at Geneva on September 1, 1926. An invitation was sent to the United States requesting that it send delegates but Secretary Kellogg declined because he felt that it would serve no useful purpose. In his reply he stated that the Senate reservations were "plain and unequivocal" and must be accepted according to the mode of procedure specified by the Senate in its resolution.¹

¹ U.S. Congress, Senate, Senate Reports, Report No. 758, 72nd Congress, 1st Sess., Vol. II, 9488, 50.

Despite the American refusal to attend the conference the nations met at Geneva and on September 23rd announced the following conclusions in a Final Act:

1. First Four Reservations: These were fully accepted with the exception of a minor modification of Reservation No. 4, Pt. 1.

2. Fifth Reservation, Part 1: The conference agreed to announce all advisory opinions in public sessions and that it would also revise Articles 73 and 74, Rules of Court, to further clarify advisory opinion procedure. It also suggested that the United States and the signatory powers study an incorporation of certain principles into a protocol of execution.

3. Fifth Reservation, Part 2: The conference felt that there were basically two types of advisory opinions which could affect the United States: (1) An advisory opinion involving a dispute or question in which the United States was a party; and, (2) An advisory opinion involving a dispute or question in which the United States was not a direct but an interested party. In the case where the United States was a direct party it was felt that the principle expressed in the East Karelia case would protect the United States. In the second case where the United States was not a direct party but had an interest the conference felt that a clarification of the matter was needed due to an incorrect assumption by the United States. The United States, it was contended, had assumed that a unanimous vote in the Assembly or Council was necessary for the submission of an advisory opinion to the Court. Though this had been the practice thus far followed in the Council, the conference felt that the matter as yet was not finally resolved. If the Assembly should decide that a request for an advisory opinion were a matter of substance and thus required a unanimous vote, the American position would be upheld, but if it were decided that the request for an advisory opinion were only a matter of procedure and only a majority vote needed, the United States position would be untenable. In offering a solution to the problem the conference proposed to grant the United States the position of equality it desired by placing it on the same plane in respect to advisory opinions as any other nation in the Assembly or Council.

4. Method of Consent: The conference felt that since the United States was not a member of the League, the procedure to be used in expressing its assent or dissent on a request for an advisory opinion should be clarified. This matter could be the

subject of a further understanding.²

The conference sent a report of its conclusions to the United States asking for an informal exchange of views but no official reply was made by the State Department. Thus the matter lay until President Coolidge on November 11, 1926, in an address at Kansas City, Missouri, made a clear statement of the American position. He asserted that he felt the Senate would be unwilling to modify its position on adherence if the signatories to the Court would not accept the five reservations. Then he declared that he himself would not ask the Senate to alter its position and "unless the requirements of the Senate resolution are met by the other interested nations I can see no prospect of this country adhering to the court."³

The Coolidge declaration for all intents and purposes removed the Court issue from the American scene until 1928 when Senator Gillett (R) introduced a proposal to break the deadlock.⁴ The Gillett proposal was a resolution in which he suggested the advisability of a further exchange of views in order to establish

² Philip C. Jessup, The United States and the World Court, Boston, 1929, 14-70.

³ American Society of International Law, American Journal of International Law: Supplement, Vol. 21, 19.

⁴ On February 9, 1927, an attempt was made in the Senate to rescind the Swanson resolution of adherence but it was defeated by a vote of 59-10.

whether or not the differences of opinion between the United States and the signatories of the Court could be satisfactorily adjusted.⁵ The resolution re-awakened interest in the Court but after being placed before the Senate Foreign Relations Committee it did not receive consideration by that body until May, 1928, when it was then decided not to discuss the matter until the next session of Congress.

In as much as the matter had been referred to the Foreign Relations Committee, discussion of the Court in the Senate almost ceased but the few comments that were made are of some significance. In one discussion Senator King (D) expressed the belief that a further exchange of views as proposed by Gillett might lead to the proper interpretation of the disputed "claims an interest" phrase of the fifth reservation. He felt that the word "interest" could be construed to mean a real interest as in the juridical sense or it might mean some "fantastic claim" in which the United States merely wanted to assert itself on matters entirely foreign to American interests. Senator Reed of Missouri, however, then answered that such an understanding was unnecessary for it should be understood without the assurances of a declaration that the United States would act in good faith in any claims

⁵ United States Congress, Senate, Congressional Record, 70th Congress, 1st Sess., Monday, February 6, 1928, Vol. 69, Pt. 3, 2503.

it would make. Borah then ended the discussion by stating that the situation had arrived at the point where the signatory nations must accept Reservation No. 5 or the Senate must recede from its position--the latter he considered as an "altogether improbable thing."⁶

Later, in May, Senator Gillett elaborated upon his position when he stated that though he favored an exchange of views he did not favor modifying the fifth reservation. He felt that although the Court had no jurisdiction over the United States in a dispute it did not voluntarily refer to the Court, this jurisdiction might be indirectly obtained by means of the advisory opinion power except for the existence of the fifth reservation. He did not concur with the conference's belief that the United States would accept either a majority or a unanimity vote on the advisory opinion request question just so long as it had the same rights as other members of the League. He rather felt that:

We are not at all within their jurisdiction and we feel that if at any time by accident or design, they should request an opinion of the court affecting our interests we ought to have the right of deciding whether to allow it or prevent it.

On November 24, 1928, nine days before the Congress

6 Ibid., Monday, April 19, 1928, Pt. 6, 6077.

7 Ibid., Tuesday, May 1, 1928, Pt. 7, 7508.

was to begin its session, President Coolidge at a breakfast to which members of the Senate had been invited, indicated that bringing the United States into the World Court was of much concern to him and that he was interested in renewing negotiations with the signatory nations.⁸ Co-incidentally or not, in December also, the League Council appointed a committee of juridical experts to consider amendments to the Statute of the Court. Elihu Root received and accepted an invitation to attend and before leaving he conferred with Kellogg, Swanson, Walsh and Borah upon a plan or formula which would break the Court deadlock. Several days after Root's departure, Kellogg announced that a note had been sent to each of the signatory nations requesting an exchange of views on the Court problem.⁹ In his note Kellogg mentioned that there existed some elements of uncertainty in the proposals made by the conference of 1926 such as the powers of the Council and its modes of procedure. Further, he felt that the principle layed down in the East Karelia case and the rules of the Court relating to advisory opinion procedure might possibly be changed. He therefore felt that the proposed protocol offered by the conference did not furnish the United States with adequate

8 New York Times, November 25, 1928,1.

9 Kellogg's attitude toward the Court is rather paradoxical. In four major addresses given by him on American foreign policy he made no mention of the Court, yet from 1930-1935 he served as a judge on the World Court.

protection. However, he also expressed the belief that the existent differences were slight and could be overcome in some way or by some other formula which would give the United States the protection it desired.¹⁰

10 New York Times, February 20, 1929.

CHAPTER VIII

HOOVER AND A COURT FORGOTTEN

In his Inaugural Address of March 4, 1929, Herbert Hoover did not delay in advocating American adherence to the World Court. He called attention to the fact that American statesmen were among the first to propose and also to constantly urge the establishment of a tribunal for the settlement of international controversies that were justiciable in character. Speaking then of the World Court he said:

The Permanent Court of International Justice in its major purpose is thus particularly identified with American ideals and with American statesmanship. No more potent an instrumentality for this purpose has been conceived and no other is practicable of establishment.¹

Alluding to the Senate reservations he explained that they should not be construed as an attempt by the United States to seek special privileges but rather they were intended to clarify the American relationship to the advisory opinion and other matters that were subsidiary to the major purposes of the Court. He concluded speaking on the matter by expressing the hope that some way would be found whereby the United States could participate in an

1 New York Times, March 5, 1929.

institution which he considered so fundamental to the progress of peace.

Several days after this informal endorsement of the Court by President Hoover, the Council of the League of Nations authorized the committee of jurists which it had appointed in December, to begin considering the subject of American adherence, or more specifically, the solution of the fifth reservation problem. The attention of the committee was focused upon the formula presented by Elihu Root (often referred to as the Root Formula) and after modification and simplification it was adopted. This modified formula in addition to several proposed amendments to the Statute of the Court were included in a report by the committee and were adopted by a Second Conference of Signatories. On September 14, 1929, three protocols incorporating the Root Formula and the proposed amendments to the Statute were open to the nations for signature.² These protocols provided essentially for the following changes relating to the problem of American adherence:

1. The rules of the Court in relation to advisory opinion procedure were elaborated upon and incorporated into the Statute of the Court. (Cf., Appendix VII, Articles 65, 66 and 67)

² The three protocols were entitled the Protocol of Signature, Protocol of Accession, and Protocol of Revision. The entire Protocol of Accession and part of the Protocol of Revision are found in Appendices VI and VII.

2. The provisions of the Statute which were applicable to "contentious cases", i.e., cases involving actual judgments, were to also guide the Court in its exercise of the advisory opinion power. (Cf., Appendix VII, Article 68)

3. The procedure by which the United States could express its approval of or objection to a request for an advisory opinion was outlined, and the method by which the United States might withdraw from the Court if it so chose was provided for. (Cf., Appendix VI, Article 5)

Over two months passed before the United States manifested any official attitude toward the newly proposed protocols. It was finally on November 18, 1929, that Henry L. Stimson, then Secretary of State, referred a letter to President Hoover requesting authorization to sign the Court protocols on behalf of the United States. In his rather lengthy letter Stimson asserted that the protocols completely satisfied the Senate reservations and then in detail he expounded his position. He believed that the objection that the Court might render advisory opinions in private was no longer valid because the rules of the Court concerning advisory opinion procedure had now been made permanent and unrepealable. Stimson then went into a discussion of the second part of the fifth reservation, considering its construction from two aspects. He first maintained that if the United States were involved in a "dispute" in which it had an interest an advisory opinion could not be rendered by the Court without American consent because the proposed Article 68 incorporated the principle expressed in the East Karelia case into the Court Statute. Considering the fifth reservation from the aspect of a

"question" in which the United States "claims" an interest he foresaw two possible situations. The first situation that might arise would be where the United States had an interest so vital that it objected to its consideration; if this were the case in all probability the matter had already reached the status of a "dispute" and the United States could veto the request under Article 68. The second situation that might arise would be concerning a matter in which the United States had a slight interest; if this were the case the United States would not arbitrarily use its veto. From his analysis of the problem Stimson felt that the field covered by the second part of the fifth reservation was thus very narrow and the need for a veto slight. But, he contended, even this contingency was provided for by Article 5 (Root Formula) which permitted the United States to oppose the rendering of an advisory opinion with the same force as a member of the Assembly or the Council, and if the United States were then unable to persuade either of these bodies that the request should not proceed, the United States could withdraw from the Court without any imputation of unfriendliness.³ Stimson therefore believed that the United States could join the Court without in the slightest degree jeopardizing its traditional policy "of not

³ American Society of International Law, American Journal of International Law; Supplement, Vol. 25, New Hampshire, 1931, 52-56.

interfering or entangling ourselves in the political policies of foreign States or of relinquishing our traditional attitude as a Government toward purely American questions."⁴

In response to Stimson's letter President Hoover in his Annual Message to Congress announced that he believed the signatory nations of the Court had so modified the Court's Statute as not only to meet the Senate reservations but to go beyond them. The Court he felt was now clearly a true court of international justice. He declared further that the doubt about advisory opinions had been completely dispelled because now "no controversy or question in which this country has or claims an interest can be passed on by the court without our consent at the time the question arises."⁵ Seeing United States adherence to the Court as newly constituted as not the slightest step toward entering the League of Nations he announced that he would direct the affixing of the American signature to the protocols and would submit them to the Senate in a special message when the time was convenient.⁶ On December 9, 1929, Jay P. Moffat signed the three

4 Ibid., 57-58.

5 Message of the President of the United States Communicated to the Two Houses of Congress, 71st Congress, 2nd Sess., December 3, 1929, Washington, 1929, 2.

6 Hoover probably postponed submission of the protocols because of the London Disarmament Conference and the many domestic issues created by the onset of the depression.

protocols on behalf of the United States.

A year passed before President Hoover submitted the protocols with a special message to the Senate. In his message of December 10, 1930, he iterated the stand he made the previous year declaring that there was no danger of entanglement by American adherence, that American appearance before the Court was strictly voluntary, and that the United States was free to withdraw at any time if it so chose without ill will or reproach.⁷ With this declaration the Court issue, for all practical purposes, passed from the hands of Hoover.

Upon the reception of the protocols the Senate immediately referred them to the Foreign Relations Committee⁸ where they remained for the next two years. The history of the World Court protocols in committee is discussed in detail by Denna F. Fleming and Eleanor Dennison and need only be summarized here.⁹ The committee postponed consideration of the protocols until January, 1931, when Elihu Root, in a hearing before the committee declared that the protocols fully accepted the Senate

7 American Society of International Law, American Journal of International Law: Supplement, Vol. 25, 49.

8 Senators Borah, Johnson, Moses, LaFollette, Jr., and Shipstead of the anti-Court group were still on the committee.

9 Cf., Denna F. Fleming's The Veto of the American Senate, New York, 1930, and Eleanor Dennison's The Senate Foreign Relations Committee, Stanford, California, 1942.

reservations. On March 22, 1932, Secretary Stimson sent a letter to the Senate committee explaining his position and later on April 6th made a personal appearance. Stimson concurred with Root's construction of the protocols believing that the Protocol of Accession "imposes the jurisdictional restriction upon the World Court as to advisory opinions which was sought by the fifth reservation of the Senate."¹⁰ Finally, on May 12, 1932, a resolution of adherence, accompanied by a report submitted by Senators Walsh and Fess, was voted out of committee. However, the Senate decided not to consider the committee resolution until after the coming presidential election and the Court issue thus passed to the Roosevelt administration.

The committee resolution mentioned immediately above was basically a restatement of the fifth reservation. It proposed that the advice and consent of the Senate to adherence to the Court would only take effect after the signatories expressed, by an exchange of notes, their understanding that the Court would not without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which it had or claimed an interest.¹¹ The accompanying

¹⁰ United States Congress, Senate, Senate Reports, Report No. 758, 72nd Congress, 1st Sess., Vol. II, 9488, 59.

¹¹ Ibid., 1.

explanatory report declared that the committee could not accept the Root and Stimson construction of the protocols for they were at the very least, ambiguous. In summary the committee declared that the true difficulty was related only to the possibility that some nation or nations through the Council or Assembly might make a proposal for an opinion by the Court on some question of international law on which the United States would prefer no opinion be given "because, perchance, this country might thereby be embarrassed should it subsequently be embroiled in a controversey with some power in which the same principle would be involved."¹²

12 Ibid., 13.

CHAPTER IX

A COURT BUT NOT ANY COURT

From the viewpoint of number the attitude of the Senate did not appear to undergo any significant change after the presentation of the new protocols. In 1926, seventeen senators opposed adherence to the Court, while, in 1930, according to a survey of Senate opinion by a delegation of women, some fifteen to twenty senators were still opposed.¹ From the viewpoint of substance it may also be said that no basic change occurred. Essentially, the arguments for and against the Court were the same though they were modified to meet the new conditions. Instead of repeating them then the investigator will summarize the arguments presented by Senator Gillett, a pro-Court reservationist senator, and Senator Pepper, a member, newly enlisted, of the anti-Court group.

Senator Gillett thoroughly supported the fifth reservation of the Senate for he believed that it secured for the United States the same protection as to advisory opinions as in the case

1 New York Times, January 17, 1930.

of actual judgments and because the reservation made certain that no decision affecting the United States would be made, under the cloak of an advisory opinion, without American consent. The Senator felt that the Protocol of Accession fully accepted the Senate reservations "subject only to certain agreements as to procedure" as provided for by the Root Formula (Article 5).² He believed that with the inclusion of the Root Formula and Article 68, which strengthened the East Karelia decision, there was not the slightest chance that the United States would be forced to withdraw from the Court. The League, he was convinced, would never press the submission of an advisory opinion against American protest to the point where this would occur, and, even if this did happen, the United States would be no worse off than it was before it entered the Court. It was his conviction that the objections of those who opposed the Court had their origins in "the hostility which exists against the League of Nations."³

Representing the anti-Court group was Senator Pepper who believed that the proposed amendments to the Court Statute fell "far short of giving us adequate protection against League entanglement."⁴ He presented several objections. First, the

2 Congressional Record, 71st Congress, 3rd Sess., Monday, December 15, 1930, Vol. 74, Pt. 1, 691.

3 Ibid., 692.

4 George W. Pepper, "The Leak in the Dike", Saturday Evening Post, Vol. 202, March 29, 1930, 27.

Court by exercising the advisory opinion power was performing a function that was partly political for it was acting as a legal advisor for a political body. By the fifth reservation, which the Court signatories had actually refused to accept, both the Court and the United States were protected from the advisory opinion power which would serve as an opening through which the League might "intermeddle in a controversey between sovereign states."⁵ Secondly, Article 68 would not protect the United States from an advisory opinion rendered against its consent for the Court, not the United States, would determine whether or not the element of consent was applicable. Even assuming that the principle expressed in the Eastern Karelia case was recognized by the Court in a given case, what attitude would the Court take toward the objection of a nation (the United States) that was not a party to the controversey but still had a direct interest? Alluding to American foreign policy Pepper felt that it could be summed up by three principles: (1) Avoid interference in the affairs of European nations; (2) Discourage interference by European nations in affairs of the Western Hemisphere; and, (3) Settle disputes in which America is a party peacefully and encourage other nations to do likewise without violating the first two principles. In other words, Pepper declared:

5 Ibid., 78.

these three propositions mean we should keep out of the League of Nations, stand by the Monroe Doctrine, support the Hague Tribunal, and if we adhere to the Court, do so upon the condition that the League of Nations is not to worm its way into our controversies by referring them to the judges of the Court without our consent.⁶

Turning to newspaper attitudes toward the new protocols a canvas made by the pro-Court American Foundation indicated that most papers favored adherence as was the case in 1926. Of 1,694 newspapers that replied in the poll 1,357 (80.1%) favored adherence, 265 (15.6%) were opposed, and 72 (4.3%) took no stand or were unable to be classified.⁷ Considering specific newspapers, the Chicago Daily Tribune still maintained its opposition on the grounds that adherence would mean entanglement in European politics and the sacrificing of "national political independence"⁸ while the New York Times continued hoping that it would not be too much longer before the United States accepted its own "creation."⁹ Maintaining its stand in supporting the Court the Chicago Daily News saw no serious possibility of the United States' withdrawing from the Court because of a disagreement over the

6 Ibid., 83.

7 Editorial, "War Renewed Over the Peace Court", Literary Digest, Vol. 107, December 20, 1930, 11.

8 Chicago Daily Tribune, December 12, 1930.

9 Editorial, "Court and Senate", New York Times, December 11, 1930.

submission of an advisory opinion request. It felt that the "irreconcilables" were "conjuring up imaginary international perils and making rhetorical mountains out of molehills."¹⁰

A final examination of periodical literature found no significant changes in attitudes toward the Court since 1926. Basic convictions seemed to have changed little if any by the newly proposed changes to the Court. Advocates of American entrance into the Court saw the new proposals as evidence of the Court's merit while opponents of the Court interpreted the proposed changes as meaning little or nothing. One of the exceptions to the last statement was the Christian Century which had previously objected to adherence. It had formerly expressed fear that the League of Nations might use force in the enforcement of Court decisions and that the advisory opinion power might be used for political rather than judicial ends. The Century now felt that these objections had been removed since the League Assembly had disclaimed the right to use force and because Article 68 had been incorporated into the Court Statute.¹¹

¹⁰ Editorial, "The World Court Before the Senate", Chicago Daily News, December 12, 1930.

¹¹ Editorial, "Why the Root Formula?", Christian Century, Chicago, XLVII, February 12, 1930, 199-201.

CHAPTER X

CONCLUSION

In attempting to draw any conclusions concerning the United States and the World Court the Senate merits primary consideration. Upon considering the anti-Court group attitude in the Senate one theme is found running consistently beneath objections to American entrance into the World Court, namely, an ultra-nationalism. This ultra-nationalism had for its constitution two basic principles: (1) Non-entanglement by the United States in European affairs; and, (2) Non-interference by Europe in affairs of the Western Hemisphere. To the anti-Court senators these principles were the only touch-stones to be used in formulating American foreign policy; they were unalterable and superceded any and all other policies. Once understanding this it is not difficult to comprehend the opposition of the anti-Court group to American adherence to the World Court. To the anti-Court senators the Court issue was simply whether or not the United States should abandon its policies of non-entanglement and non-interference in preference to the secondary policy of encouraging the peaceful settlement of international disputes. They of course

unhesitatingly chose the former alternative.

In analyzing the objections presented by these senators it is not difficult to detect their attempt to demonstrate that adherence to the Court also meant violation of these two principles. They first of all felt that the principle of non-entanglement was violated because the Court was associated with the League of Nations, an institution which was considered by them as completely European in its origin, composition and objectives. In attempting to prove an intimate and vital connection between the Court and the League they concentrated on such controversial issues as the election of judges, the payment of their salaries and pensions, and, especially the advisory opinion power. The anti-Court group also felt that the principle of non-interference would be violated by adherence to the Court because the League of Nations via the advisory opinion power might attempt to dictate to the United States on questions or disputes involving the Monroe Doctrine or even on domestic matters and issues of vital national import. This conviction serves to explain their opposition to the enforcement of Court decisions by use of force and to the optional compulsory jurisdiction clause of the Court Statute. If the United States were to bind itself to compulsory jurisdiction, though even on only justiciable matters, and if the League of Nations were to use force to enforce decisions of the Court, two very powerful clubs, one moral and the other

physical, could be used against America.

From what has been said, however, it must not be construed that the anti-Court group was opposed to an international court of justice. True, they opposed entrance into the World Court, an international court, but the reason for their opposition was because of its entangling League connection. To confirm this, mention only need be made of the Lodge and Pepper resolutions and the various comments of Senator Borah. They desired an international court but it had to be completely divorced from the League; the World Court despite American reservations could never meet these requirements. Thus in truth, though the anti-Court senators did propose reservations to the resolution of adherence, there is strong evidence that indicates that they did not believe their proposals would achieve the divorcement they desired, but rather they sought the defeat of the resolution by incorporating into it so many reservations that the Court's signatory nations would be unable to accept them as eventually proved to be the case. Perhaps best summing up the anti-Court attitude was a statement by Senator Fernald (R) on the subject of the World Court and world peace. Stating his position he said: "I, too, am an American. I am for world peace, but I refuse to endorse "peace at any price". I am for American

independence, not isolation."¹

While the issue to the anti-Court senators was essentially a simple one, such was not the case for the reservationist senators of the pro-Court group. Many factors weighed so evenly on both sides of the question the reservationist senators, composed predominantly if not entirely of Republicans, found themselves faced with a dilemma. On one side of the scale they saw the "mandate" of 1920 which was interpreted by the majority of the party as a vote of the American people against the League of Nations and anything associated with it which probably also meant the Court. On the other side they saw that Court adherence was clearly continuing the traditional national and Republican policies of encouraging the peaceful settlement of international disputes. These latter two policies had special significance at the time for after World War I a world-wide effort was made to promote international peace and the United States gave it full endorsement. Now it seemed that if the United States were sincere in its professions of desiring world peace it certainly would support an agency designed to achieve that end. Confronted with this dilemma the reservationists seemed to have resorted to a compromise, namely, adherence to the Court but under certain conditions. Thus they would join the Court but only after they had

¹ Congressional Record, 69th Congress, 1st Sess., Friday, January 15, 1926, Vol. 67, Pt. 2, 2106.

made it completely entanglement proof.

This is exactly what occurred but the fifth reservation which demanded an American veto over requests for advisory opinions proved to be one too many, for the signatory nations could not accept it. In the final analysis, strange as it may seem, it was probably the reservationist rather than the anti-Court senators who played the greater role in preventing American adherence to the World Court. This seems to be the case for although the anti-Court senators were responsible for delay of the Court issue in committee, they, at no time while the matter was on the Senate floor, could have mustered nearly enough votes to defeat the measure on adherence. Actually, the reservationists in their zeal to block every possible avenue of entanglement, and there proved to be many, destroyed what they may have been attempting to create. The phrase "may have been" is deliberately used because there exists the possibility that these senators realized in advance that their reservations would probably not be accepted but incorporated them in the resolution of adherence anyway for then their dilemma would be solved. Assuming that this were the case, if the reservations were accepted the United States would be left completely protected, but if they were not at least it could be said that the United States had made a sincere attempt to join the Court but had been rejected. Whatever the answer, it is at least interesting to speculate on the subject.

In mentioning lastly the attitudes of the remaining senators of the pro-Court group little need be said. This group was composed mostly of Democrats who had various reasons for supporting the Court as already indicated. However, most of these reasons probably had their foundations in the conviction that strict interpretation and application of the principles of non-entanglement and non-interference were no longer possible. Instead it was believed that the United States had to modify these principles so as to bring about an end to American isolation and the beginning of an intimate cooperation between nations for their mutual benefit. The Court, and in many cases the League, was an agency that would aid in bringing about such cooperation. Undoubtedly that is why many of these senators supported adherence to the Court and that is why some, it is difficult to say how many, hoped that Court entrance also would mean League entrance.

Turning now to presidential and state department attitudes it can be said without too great a fear of error that the three Republican administrations favored adherence to the Court. All three presidents seem to have honestly desired that the United States join the Court because it was in accordance with the traditional American policy of encouraging the peaceful settlement of international controversies. It appears also, however, that they realized there was some danger of an entangling League

connection with the Court and therefore were not opposed to certain reservations that would guarantee Court independence. This is especially true of Harding and Coolidge. To what extent they thought American adherence should be conditioned is difficult to say. The Hughes reservations seemed to have satisfied Harding for he sent them to the Senate along with his approval. But after his ambiguous speech at St. Louis there is room for doubt as to whether or not he felt that further reservations were necessary. Coolidge seems to have accepted the Hughes reservations and although he did propose a fifth condition concerning the advisory opinion, this seems to have been only an attempt upon his part to stimulate the Senate into action on the Court issue. His interest in American adherence to the Court seems to have been confirmed when at the end of his term he suggested and began a renewal of negotiations after the Court issue ran into a deadlock. Finally, in the case of President Hoover there appears to be little room for doubt for he submitted the final protocols to the Senate despite strong opposition from certain quarters and despite also the presence of many pressing domestic problems resulting from the developing depression. Perhaps it may be wondered why the three administrations did not make more determined efforts to bring about Court adherence when they saw the issue lagging. The answer to this is made clear when it is remembered that the matter of American adherence to the Court was

essentially one involving the treaty power of the Senate--a power which that body has always strongly guarded. Thus it was only in the province of the president to recommend, not to dictate.

Bringing the discussion now to a conclusion only brief mention will be made of newspaper and periodical attitudes. Because this thesis did not attempt to make an intensive examination of newspaper attitudes no categorical statements can be made. However, from the limited amount of research done evidence seems to indicate that opposition to the Court was based upon the fear that Court entrance would mean League entrance with the latter's subsequent entanglements and interferences. On the other hand, support of the Court seems to have stemmed primarily from the desire to continue the traditional American policy of encouraging the judicial settlement of disputes. Considering lastly periodical literature little need be said because of what has already been presented. However, mention should be made of one element that seemed to permeate many articles, namely, the strong desire manifested for the promotion and eventual establishment of world peace. Reflecting upon this one cannot but help note the strange irony in the fact that so many men should desire the same goal, and yet should disagree so much on how that goal should be obtained.

END

APPENDIX I

LIST OF ORGANIZATIONS FAVORING ADHERENCE

TO THE WORLD COURT

A. Women's Organizations:

National League of Women Voters, National Women's Christian Temperance Union, General Federation of Women's Clubs, American Association of University Women, Young Women's Christian Association, National Council of Jewish Women, National Women's Trade-Union League, National Federation of Business and Professional Women's Clubs, National Council of Women, Travel Club, Delphian Society, Women's International League for Peace and Freedom and Girls' Friendly Society of America.

B. Religious Organizations:

Federal Council of the Churches of Christ in America, Protestant Episcopal Church, United Society for Christian Endeavor, National Council of Episcopal Churches, Society of Friends, American Unitarian Association, Baptist World Alliance, National Council of Congregational Churches, Central Council of American Rabbis, International Convention of the Disciples of Christ, Southern Presbyterian Churches, Universalists General Convention, National Council of Episcopal Churches and World's Sunday School Association.

C. Miscellaneous Organizations:

American Bar Association, United States Chamber of Commerce, American Federation of Labor, Foreign Policy Association, National Association of Credit Men, World Peace Foundation, American Federation of Teachers, National Service Star Legion, Veterans of Foreign Wars, American Legion, Military Order of World War, National Congress of Mothers' and Parent Teachers' Association, League of Nations Non-Partisan Association and C.A.R. posts.

N.B. The above list was derived from telegrams, memorials, letters

etc., found in the Congressional Record dated 1921 to 1931. These sources may be conveniently located by referring to the Index of the Record.

APPENDIX II

STATUTE OF THE WORLD COURT,

DECEMBER 16, 1920

(EXCERPTS)

Article 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

Article 32. The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing conditions under which retiring pensions may be given to the personnel of the Court.

Article 33. The expenses of the Court shall be borne by the League of Nations, in such manner as shall be decided by the Assembly upon the proposal of the Council.

Article 35. The Court shall be open to the Members of the League and also to states mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

Article 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States

mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a). The interpretation of a Treaty;
- (b). Any question of International Law;
- (c). The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d). The nature of extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court

United States Congress, Senate, Senate Documents, Document No. 45, 69th Congress, 1st Sess., Vol. I, 8557, Washington, 1932, 4-15.

APPENDIX III

TREATY OF VERSAILLES

(EXCERPTS)

Article 12. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to enquiry by the Council, and agree in no case to resort to war until three months after the award by the arbitrators or the report of the Council.

.....

Article 13. The Members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily handled by diplomacy, they will submit the whole subject matter to arbitration.

Disputes as to the interpretation of a treaty, as to any questions of international laws, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against any Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps to be taken to give effect thereto.

Article 14. The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of international character which the parties thereto submit to it. The Court may also

give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Article 15. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

.....
If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties of the dispute, the Members of the League that they will not go to war with any party to the dispute which complies with the recommendation of the report.

Article 16. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such cases to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

Article 17. In the event of a dispute between a Member of the League and a State which is not a Member of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

.....
If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State

taking such action.

United States Congress, Senate, Senate Documents, Document No. 49,
66th Congress, 1st Session, Vol. 1, 7608, Washington, 1919.

APPENDIX IV

RULES OF COURT, DECEMBER 16, 1920

(EXCERPTS)

Article 72. questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary General of the League under instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light on the question.

Article 73. The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary General of the League, and to the states mentioned in the Annex to the Covenant.

Notice of such request shall also be given to any international organisations which are likely to be able to furnish information on the question.

Article 74. Any advisory opinion which may be given by the Court and request in response to which it was given shall be printed and published in a special collection for which the Registrar shall be responsible.

America and the Permanent Court of Justice, in League of Nations, Vol. V, No. 5, published by the World Peace Foundation, 1922.

APPENDIX V

SENATE RESOLUTION NO. 5,

JANUARY 27, 1926

Whereas the President, under date of February 24, 1923, transmitted to the Senate, accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the Protocol of December 16, 1920, of Signature of the Statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence: Therefore be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adherence on the part of the United States to the said Protocol of December 16, 1920, and the adjoined Statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said Statute), and the signature of the United States affixed to the said Protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to

time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said Protocol and that the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States.

5. That the Court shall not render any advisory opinion except publicly after due notice to all states adhering to the Court and to all interested states and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said Protocol shall not be affixed until the powers signatory to such Protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to said Protocol.

Resolved, further, As a part of this act of ratification that the United States approve the Protocol and Statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

Resolved, further, That adherence to the said Protocol and Statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said Protocol and Statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

United States Congress, Senate, Senate Documents, Senate Resolution No. 5, Senate Document No. 45, 69th Congress, 1st Session, Miscellaneous Vol. 1, 8557, Washington, 1926.

APPENDIX VI

PROTOCOL OF ACCESSION

SEPTEMBER 14, 1929

The state signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, dated December 16, 1920, and the United States of America, through the undersigned duly authorized representatives have mutually agreed upon the following provisions regarding the adherence of the United States of America to the said Protocol, subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January, 1926.

Article 1. The states signatories of the said Protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said Protocol upon the terms and conditions set out in the following articles.

Article 2. The United States shall be admitted to participate, through representatives designated for the purpose and upon an equality with the signatory states Members of the League of Nations represented in the Council or in the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, provided for in the Statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required by the Statute.

Article 3. No amendment of the Statute of the Court may be made without the consent of all the contracting parties.

Article 4. The Court shall render advisory opinions in public session after notice and opportunity for hearing substantially as provided in the now existing Articles 73 and 74 of the Rules of Court.

Article 5. With a view to insuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the

United States has or claims an interest, the Secretary-General of the League of Nations shall, through any channel designated for that purpose by the United States, inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether an interest of the United States is affected shall proceed with all convenient speed between the Council or the Assembly of the League and the United States.

Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other States mentioned in the now existing Article 73 of the Rules of Court, stating a reasonable time limit fixed by the President within which a written statement by the United States concerning the request will be received. If for any reason no sufficient opportunity for an exchange of views upon such request should have been afforded, and the United States advises the Court that the question upon which the opinion of the Court is asked is one that affects the interests of the United States, proceedings will be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place.

With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.

If, after the exchange of views provided for in pars. 1 and 2 of this article, it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to cooperate generally for peace and good will.

Article 6. Subject to the provision of Article 8 below, the provisions of the present Protocol shall have the same force and effect as the provisions of the Statute of the Court and any future signature of the Protocol of December 16, 1920, shall be deemed to be an acceptance of the provisions of the present Protocol.

Article 7. The present Protocol shall be ratified. Each state shall forward the instrument of ratification to the Secretary-General of the League of Nations, who shall inform all the other signatory states. The instruments of ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The present Protocol shall come into force as soon as all states which have ratified the Protocol of December 16, 1920, and also the United States, have deposited their ratifications.

Article 8. The United States may at any time notify the Secretary-General of the League of Nations that it withdraws its adherence to the Protocol of December 16, 1920. The Secretary-General shall immediately communicate this notification to all the other states signatories of the Protocol.

In such case the present Protocol shall cease to be in force as from the receipt by the Secretary-General of the notification by the United States.

On their part, each of the other contracting states may at any time notify the Secretary-General of the League of Nations that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of December 16, 1920. The Secretary-General shall immediately give communication of this notification to each of the states signatories of the present Protocol. The present Protocol shall be considered as ceasing to be in force if and when, within one year from the date of receipt of said notification, not less than two-thirds of the contracting states other than the United States shall have notified the Secretary-General of the League of Nations that they desire to withdraw the abovementioned acceptance.

Done at Geneva, the fourteenth day of September, nineteen hundred and twenty-nine, in a single copy, of which the French and English texts shall both be authoritative.

United States Congress, Senate, Senate Reports, Report No. 738, 72nd Congress, 1st Sess., Vol. II, 9488, Washington, 1932, 36-38.

APPENDIX VII

ANNEX TO THE PROTOCOL OF REVISION

SEPTEMBER 14, 1929

Article 65. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

Article 66. The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any states entitled to appear before the Court.

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any Member or state referred to in the first paragraph have failed to receive the communication specified above, such Member or state may express a desire to submit a written statement, or to be heard; and the Court will decide.

Members, States and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States or organizations in the form, to the extent and within the time-limits which the Court, or should it not be sitting, the President shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States and

organizations having submitted similar statements.

Article 67. The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.

Article 68. In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

United States Congress, Senate, Senate Reports, Report No. 758, 72nd Congress, 1st Sess., Vol. II, 9488, Washington, 1932, 32.

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APPROVAL SHEET

The thesis submitted by Joseph J. Schmitz, Jr. has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

Oct. 8, 1956
Date

Paul Kinney
Signature of Adviser